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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-180
HENRY SMITH, etc., *et al.*,
Appellants-Defendants,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

76-183
BERNARD SHAPIRO, etc., *et al.*,
Appellants-Defendants,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

76-5193
NAOMI RODRIGUEZ, etc., *et al.*,
Appellants-Intervenors,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

76-5200
DANIELLE and ERIC GANDY, etc., *et al.*,
Appellants-Plaintiffs,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, ETC., *ET AL.*

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BRIEF FOR APPELLEES ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, ETC., ET AL.

Questions Presented

1. Was the District Court's decision, holding that the procedures authorizing the peremptory removal of foster children from foster homes without a prior hearing violate the due process rights of foster children, consistent with this Court's interpretation of the due process clause of the Fourteenth Amendment?

2. Did the District Court have jurisdiction to recognize the constitutional rights of foster children, and to fashion relief accordingly, when the only arguments in support of such rights were advanced by appellee foster parents?

APPELLEES' STATEMENT OF THE CASE

The named appellees in this civil rights class action are individual foster parents and an organization of foster parents. Together they filed suit on their own behalf and on behalf of the foster children for whom they have provided homes for a year or more, asserting that New York Social Services Law §§383(2) and 400, and 18 New York Code Rules and

Regulations §450.14,* the provisions governing the removal of foster children from foster homes, violate the due process and equal protection clauses of the Fourteenth Amendment.

The appellant state officials, Bernard Shapiro, et al., are responsible for the regulations and policies governing foster care.** Appellants Smith et al.

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* Since renumbered as 18 N.Y.C.R.R. §450.10 Appendix 1a to appellant Rodriguez's brief ("R.A")

** The term foster care refers to 24-hour-a day residential care provided to a child outside his own home in either a foster family home, a group home or group residence, or a child-care institution. In New York state, such care may be provided by programs operated directly by a local public welfare district, or by programs operated by authorized voluntary child-care agencies, pursuant to New York Social Services Law §371(10). Such voluntary child-care agencies provide services for almost 90% of the children in foster care in New York City and for 21% of the children in foster care in the rest of the state. New York Temporary State Commission on Child Welfare, Final Report to the New York State Department of Social Services Title IV-B, Research and Demonstration: Barriers to the

(fn. cont'd on next page)

are responsible for the administration and supervision of the child-care system in New York City. Appellants Rodriguez et al., defendant-intervenors, represent natural parents whose children have been placed in the foster care system. Appellants Gandy et al. represent the interests of foster children as perceived by court-appointed counsel Helen Buttenwieser.*

Appellant public officials paint a self-serving portrait of the child-care system unsupported by either the record below or any other authority. Appellants Gandy and Rodriguez base their arguments on a description of the child-care system equally unsubstantiated by reality.

Appellants have described to the Court in their Statements of the Case the theories on which the New York foster care system are based. The facts concerning the named plaintiffs in this law suit far more accurately illustrate the reality of the New York foster care system, on which the three-judge court based its decision

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(fn. cont'd from preceding page)

Freeing of Children for Adoption, hereinafter "Barriers," p. vii. They are subject to inspection, supervision and regulation by the State Board of Social Welfare and are almost entirely publicly funded. See Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974).

* After her appointment by the court, Ms. Buttenwieser filed an answer to the complaint and thereafter assumed the position of a party defendant. See Point III infra.

declaring the challenged procedures unconstitutional. Those facts show the manner in which vital relationships can be summarily interrupted at any time.

A. The Named Plaintiffs

1. Mrs. Smith and the Gandy Children

Mrs. Madeline Smith, a widow whose only child had died, became a foster parent under the supervision of Catholic Guardian Society, an authorized voluntary child-care agency, after making clear to the agency that she wanted to care for children who had no family of their own. (Appendix in the Supreme Court of the United States, hereinafter "A," p. 21a) At the time she applied to become a foster parent, Mrs. Smith explained to a worker at Catholic Guardian Society that she had arthritis, and was told that that would not present any problem. (Record, "R.", affidavit of Madeline Smith, ¶6, docket entry #2) Eric and Danielle Gandy, then four and two years old respectively, were placed with Mrs. Smith as foster children in February, 1970. It was undisputed that Danielle had never seen her biological mother and that Eric did not remember her.* In her affidavit in support of the application for a temporary restraining order, (R., docket entry #2) Mrs. Smith described the children and how they had changed since they had come to live with her:

> "3. . . . Both Eric and Danielle were very shy, frightened children when they first came home

* Opinion of the District Court, hereinafter referred to as "opinion," p. 6a of Appellants' Joint Appendix to Jurisdictional Statements, hereinafter "A.J.S."

> with me four years ago. It took them a long time not to be frightened. I think if they were away from me now they would never get over it.
>
> 4. I love these children very much and if they were taken from me now, without there even being a reason, I would suffer very much, particularly since I know how scared and unhappy they would be.
>
> . . .
>
> 11. When Danielle came to my house she was very insecure and withdrawn. Within a short period of time, she became outgoing and was easily weaned from the bottle and toilet trained. Mine is the only home she has known and she is now a well integrated member of my family.
>
> 12. When Eric arrived in my home, he was five and could barely speak. He was easily frightened and seemed worried that he would have to leave. After several months he developed a close relationship with my grandson Stanley, whom Eric treats as a brother. He also became involved in church activities through Stanley and now seems secure in my home and in the neighborhood."

In 1974, a new agency worker assigned to the case observed that Mrs. Smith did, indeed, have arthritis and decided that Eric and Danielle should be removed from Mrs. Smith's home, despite the fact that the agency "considered Mrs. Smith to be an

excellent foster mother who had done wonders with Eric and Danielle." (R., affidavit of Marcia Robinson Lowry, ¶6, docket entry #2)

In February, 1974, the agency requested and received a letter from Mrs. Smith's physician stating that she was disabled and had to walk with a cane. (R., affidavit of Bracha Graber, ¶4, 6, docket entry #64) The letter also contained a statement, which had been crossed out, stating that Mrs. Smith was totally disabled (R. id., at ¶7, 9) On March 29, 1974, an agency worker gave Mrs. Smith notice, pursuant to 18 N.Y.C.R.R. §450.14, that Eric and Danielle were to be removed from her home on April 24. The form she received, Exhibit A to plaintiffs' Second Amended Complaint (A., 37a) contained the mimeographed statement:

> "To continue to plan for _____, it is now in (his)(her)(their) best interests to leave your home on or about _____."

The only blank spaces on the form were for Mrs. Smith's name and address, for the children's names, and for the date on which the children were to be removed.

On April 24, 1974, a foster care review hearing was held in New York Family Court, a routine review of the foster care status of Eric and Danielle Gandy, required to be held every twenty-four months pursuant to New York Social Services Law §392.* Mrs. Smith appeared without

* For a discussion of §392, see Point II, infra.

counsel at the hearing. A representative from the Catholic Guardian Society also appeared, (R., affidavit of Bracha Graber, ¶14, docket entry #64) although the record does not reflect whether counsel for the agency was present. At the hearing, Mrs. Smith produced a letter from her doctor, dated subsequent to the letter from the same doctor which had described her as disabled. This new letter explained:

> "[Mrs. Smith] is disabled in terms of employment but is able to do household tasks and is capable of taking care of children." (R., Exhibit A to affidavit of Marcia Robinson Lowry submitted in support of application for temporary restraining order, docket entry #2)

After the hearing, the Family Court entered an order of disposition pursuant to New York Social Services Law §392(a) directing that foster care be continued. (R., affidavit of Bracha Graber, ¶15, docket entry #64) On May 2, 1974, a worker from the Catholic Guardian Society arrived at Mrs. Smith's home to remove the children. (R., affidavit of Madeline Smith, ¶5, docket entry #2) The children were not at home. At that point Mrs. Smith engaged counsel, who contacted the agency and asked that the removal be delayed until the facts were clarified. The agency director, James O'Neill, a named defendant below, acknowledged that there was no reason to believe that there was any danger to the children, and that the facts were unclear, but that the children would be removed from Mrs. Smith's home by May 10. The agency planned to move the

children to a small institution. (R., affidavit of Marcia Robinson Lowry, ¶3, 4, 7, 8, docket entry #2)

On May 9, 1974, Mrs. Smith filed this action on her own behalf and as next friend of Eric and Danielle Gandy. At 4:20 p.m. on that day, the removal of the Gandy children from Mrs. Smith's home was temporarily restrained by the federal court. (R., docket entry #2) That injunction was continued until dissolved during the course of this litigation, based on a representation that the agency had changed its plans about removing the Gandy children from their home with Mrs. Smith.

As of this date, Eric and Danielle remain in "temporary" foster care with Mrs. Smith under the supervision of a different Catholic Guardian Society worker than the one who had decided Eric and Danielle should be removed from their home. Mrs. Smith has initiated legal action to adopt Eric and Danielle, by filing a §392 petition asking that the court direct that the children be legally freed for adoption by Mrs. Smith.* The Family Court denied Mrs. Smith's application while noting:

> "Although her mobility is severely limited, she has been able to care for the children with the assistance of others, particularly a 21-year-old grandson and an unrelated gentleman who has apparently established a stable relationship with her and the children." (R.A. 117a)

Having refused Mrs. Smith's application for an order of disposition pursuant to Social Services Law §392(7)(c), the court entered an order pursuant to §392(7)(a):

> "Foster care continued." (R.A. 117a)

Although Mrs. Smith is in the process of appealing this decision, the Gandy children remain in "temporary" foster care with Mrs. Smith after seven years, still not legally free for adoption. Should this Court reverse the decision below, they would once again be in jeopardy of the same arbitrary and peremptory removal from their home which was restrained by the federal court at the commencement of this litigation.

2. Mr. and Mrs. Lhotan and the Wallace Children

Plaintiff appellees George and Dorothy Lhotan joined this action after they received notice pursuant to the challenged regulation, 18 N.Y.C.R.R. §450.14, that the four sisters they had been caring for as foster children were to be removed from their home. Mrs. Lhotan testified that the agency told her the children were to be removed:

> "Because we loved them too much. They loved us too much." (A. 302a)

Two of the four sisters, Cheryl and

* Until this new §392 proceeding was commenced and their biological mother received notice of that court action, Eric and Danielle Gandy had had no contact with their biological mother, and her whereabouts were unknown. (R.A. 117a)

Patricia Wallace, 12 and 11 respectively when they were joined as plaintiffs in this action, had lived with Mr. and Mrs. Lhotan for almost four years. Their younger sisters, Cathleen, nine, and Cynthia Wallace, eight, had lived with the Lhotans for almost two years after spending their first two years in foster care in another foster home. (A. 300a) Appellees Mr. and Mrs. Lhotan had been foster parents for the Nassau County Children's Bureau for a total of fourteen years and had cared for six other foster children, all of whom had been returned to their biological parents without any objections by Mr. and Mrs. Lhotan. Mrs. Lhotan testified that the reason she had not been concerned about the other foster children leaving her home and going back to their biological parents was:

> "Because they went back happy." (A. 301a)

With the Wallace children, however, Mr. and Mrs. Lhotan felt differently.

> "Q. Mrs. Lhotan, you have had foster children before. Why are you objecting in this instance to having the children removed?
>
> . . .
>
> A. Because there was never --- if there were just a few visitings. The mother never came to visit these children." (A. 303a)

Mr. and Mrs. Lhotan were summoned to the Nassau Children's Bureau in June,

1974, by an agency supervisor.* Mrs. Lhotan testified:

> "When I got there, she had given me a paper to sign which I had objected and she also said that they are going to be removed from the home July 9th. . .
>
> . . .
>
> She [the supervisor] had told me that she had already discussed it with the staff, that even if we didn't sign, the children would still be dragged out of our home and I had asked them how many are coming for the children and they said, one won't be enough. There has to be a few of them coming." (A. 304a)

The paper which Mrs. Lhotan was asked to sign was the notice of her right to a conference pursuant to the state regulation, 18 N.Y.C.R.R. §450.14, which the court below found unconstitutional. The form document contained blanks only for the foster parents and child's names, the foster parents' address, and the date of the removal. The printed form contained no reason for the planned removal, and was headed "Agreement to Remove Child From Foster Family Care." (R., Exhibit A to Order to Show Cause, docket entry #16)

Cheryl Wallace, the oldest of the four sisters, testified about her partic-

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* The most recent §392 hearing concerning the Wallace children had been in 1972. (A. 304a)

ipation in the agency decision to remove the Wallace girls from the Lhotan home.

> "Q. Has anyone from the Children's Bureau asked you whether you want to leave? A. No.
>
> Q. Has anyone asked your sisters, if you know? A. No.
>
> Q. Do you have an opinion about whether you want to leave or not?
>
> . . .
>
> A. Yes.
>
> Q. Do you want any body to ask you? A. Yes.
>
> Q. Why is that? A. Because we were supposed to be taken away from our foster parents without any say.
>
> Q. Do you consider it important to have a say in whether you go or not? A. Yes, I do." (A. 305a)

The Wallace children's biological mother had visited them infrequently while they were in foster care, and they expressed strong negative feelings and an "aversion" to be returned to her. (R.A. 101a) The Nassau Children's Bureau planned to remove all four of the Wallace children from the Lhotan home on July 9, 1974. The Children's Bureau planned to return only the two younger children to their biological mother; the two older children were to be sent to live in another foster home. (R.,

affidavit of Dorothy Lhotan, docket entry #16)

On July 8, 1974, the planned removal of the four Wallace girls in accordance with existing procedures was temporarily restrained by an order of the District Court. (R., docket entry #16) The restraining order was continued and the removal of the Wallace children without a prior due process hearing enjoined pending a determination of the motion for a preliminary injunction. (R., docket entry #33) On August 29, 1974, Patricia Wallace, the biological mother of the children, filed a writ of habeas corpus in the Nassau County Supreme Court seeking immediate custody of all four children. Since the question of whether these children should be removed from their foster home would now be decided with full due process by virtue of the filing of the state court action, the District Court dissolved the prior injunction.*

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* In the State Supreme Court, counsel for the foster parents made a successful application to the court for the appointment of separate counsel to represent the foster children on the substantive issue of the children's custody. The Supreme Court granted the writ and ordered that the children be removed from their foster home, that the two younger children be returned immediately to the

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3. Mr. and Mrs. Goldberg and Rafael Serrano

The third set of named plaintiffs, Ralph and Christiane Goldberg and their foster child, Rafael Serrano, had lived together for five years when they were joined as plaintiffs in this action. Rafael was six years old when he came to the Goldberg home. As the District Court found:

(fn. cont'd from preceding page)

biological mother, and that the two older children be sent to a neutral foster home. (R.A. 90a, 108a) The Appellate Division affirmed the Supreme Court decision, citing a decision-making standard that had been applied most recently in Bennett v. Jeffreys, 51 A.D. 2d 544, 378 N.Y.S.2d 420 (2d Dept., 1976). Wallace v. Lhotan, 51 A.D.2d 252 (2d Dept. 1976). Approximately six months later, the Bennett case, on which the Wallace decision was based, was reversed by a unanimous Court of Appeals, Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976). See also In re Sanjivini K. v. Usha K., ___ N.Y.2d ___, (N.Y. Ct. of Apls. #594, decided Dec. 20, 1976). In light of New York's changing substantive law on the decision-making standard in custody disputes, it is at least questionable whether the Wallace case would be decided the same way today. In any case, the standard to be applied at any hearing held pursuant to the decision of the District Court below would be the prevailing state law standard at the time. See Statement of the Case, Point D, infra.

> "Prior to his placement in the Goldberg home, Rafael had lived with a succession of foster families after having been abused by his natural parents during the time that he remained with them. Although the Goldbergs have been repeatedly told that they have done an excellent job in providing a healthy environment in which Rafael might grow and develop they now fear, on the basis of various unofficial statements, that the Bureau of Child Welfare intends to remove Rafael and place him with his aunt." (A.J.S. 7a)

As Mrs. Goldberg testified, "It is like a sword hanging over our heads." (A. 297a)

All of these foster families are, indeed, representative of foster families whose family relationships are subject to peremptory termination under the statutes and procedure declared unconstitutional by the decision of the court below.

B. The Foster Care System in New York

Appellant public officials, natural parent-intervenors and court-appointed counsel for the foster children have portrayed a misleading picture of the foster care system in New York. Their description comports only with the platitudes of the theoretical basis for the system; it has little to do with the reality in which

foster children find themselves trapped.*

The theory is, indeed, that foster care is a temporary arrangement, designed to provide substitute care for the children of parents, usually poor parents, who are unable to care for their children at a particular time. Theoretically, children either return to their parents once the problems which precipitated the foster care placement are resolved, or a

* In summarizing the findings of a study of children whose cases were reviewed pursuant to New York Social Services Law §392, a court review enacted because of legislative concern over the numbers of children growing up in "temporary" foster care, one social scientist has noted:

"It is of course reasonable to ask why the courts were seen. . . as a necessary instrument for protecting the rights of children when agencies have long voiced their responsibility for such protection. Clearly the field's verbal assurances and its long history of service to children do not meet the public's demand for accountability in an area where the needs of the children are so urgent. . ." Festinger, The New York Court Review of Children in Foster Care, 59 Child Welfare 211, 244 (April 1975).

decision is made that the parents will not be able to ever resume care, parental rights are terminated and the children are moved into adoptive homes. It is only during this temporary period, theoretically, that the children remain in foster care.

Such a characterization is bold misrepresentation and an attempt to perpetrate a cruel hoax on foster children in the state of New York. Study after study in recent years* has criticized foster care precisely because of what the record in this case so simply demonstrates: rules and procedures concerning foster care are based on a theory that has no basis in fact. The District Court, after hearing evidence and reviewing lengthy expert witness depositions, found:

> "the average child placed in foster care remains within the system for approximately 4 1/2 years." (A.J.S. 8a, see also fn. 5 to opinion, 18a)

More than 60 per cent of the children in foster care are in individual foster homes, rather than group or institutional settings and these children are likely to remain in foster care longer than the norm and are less likely to have any contact with their natural parents.

* "[T]he existing foster care system is not, in fact, a temporary one." Wald, State Intervention on Behalf of "Neglected" Children; Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stanford Law Review 625, 626 (April 1976)

(R., Research Report on New York State Foster Care, Time Spent in Care by Children Served in the New York State Foster Care Program 1973, New York State Department of Social Services, p. 1, Exh. B to Catalano dep., admitted at p. 5) The tragic fact is that children who remain in foster care for a year or more, the only children affected by the decision of the court below, are not likely to return to their biological parent* and are not likely to be adopted.** The fact that children do not go back to their natural families is not surprising considering the reasons children enter placement in the first place. Overwhelmingly, placement occurs because of the mental illness of the parent, or

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* Prof. David Fanshel, an expert witness for defendant-intervenor Rodriguez, conducted a five year longitudinal study of selected children who entered the New York City foster care system in 1966 (A. 182), hereinafter referred to as the Fanshel study. He excluded from the study children for whom foster care was truly temporary, that is, children who entered and left within 90 days (A. 182a) Even so, he found that "the probability of a foster child being returned to his biological parents declined markedly after the first year in foster care." (A.J.S. 18a, fn. 5)

** Of the children in the Fanshel study only 4.6 (20 out of 642) were discharged to adoption during the five year study period. Fanshel, Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study, 55 Child Welfare 143, 145 (March 1976) The number of children in foster

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neglect or abandonment by the parent.*

However, a child who enters foster care because of the parent's physical illness is

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care who are being adopted declined by more than 50% between 1969 and 1974. Lash and Sigal, State of the Child: New York City, (1976) p. 72.

* "By far the most common conditions prompting admission to foster care are neglect and abandonment of dependent children by their parents." . (R., Research Report on New York State Foster Care, Time Spent in Care by Children Served in the New York State Foster Care Program 1973, New York State Department of Social Services, p. 13, Exh. B to Catalano dep., admitted at p. 5, docket entry #148)

An analysis of the key factor resulting in the placement of the children in the Fanshel study showed that the two most prevalent factors were the parent's mental illness, the majority of situations involving hospitalization of the mother in a psychiatric facility and severe neglect or physical abuse. Jenkins and Norman, Beyond Placement, pp. 13-14 (1975)

"Whether large groups of these children [in foster care in New York] ever had any kind of secure family situation is in doubt. The reasons for placement given in children's case histories. . . tell an eloquent story of family crisis and conflict. . ." State of the Child, supra, at p. 61.

to leave foster care more rapidly, more than half in the Fanshel study being discharged within the first year. (Fanshel, The Exit of Children From Foster Care, 50 Child Welfare 65, 73 (Feb. 1971))

Thus both the record in this case and studies relevant to the New York foster system provide ample evidence that the system as it now operates is not a system of temporary care; children are not moving quickly back to biological parents or into adoption. They are growing up in foster care.* And while they do so, they are likely to be shifted from one foster care setting to another. For example, of 1,505 children reported removed in 1973-74 from foster homes in which they had lived for from one through four years, only 202 were removed for a return to their biological parents and 103 were removed for placement in an adoptive home. (R., state defendants' answers to plaintiffs' interrogatories dated Aug. 12, 1974).

* According to the Fanshel study, the children who were the youngest at the time of entry in foster care were disproportionately likely to remain in care. Of those who entered when they were under two years of age, one-half were still in placement at the end of five years. Fanshel, Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study, supra at p. 146.

The record in this case reflects that almost 60 per cent of the children in the Fanshel study had experienced more than one placement, and almost 30 percent had been moved three or more times.*

* A, p. 124a, 189a.

Another recent New York study of children in care at least two years reported:

> "Observations of the foster care system also underscored the amount of movement of children once they were placed in foster care. Children moved from institutions to foster homes (usually older children) and from one foster home to another. Only 41% of the children experienced one placement only . . . [S]uch a system must communicate and reinforce a sense of impermanence to the children within it." Festinger, The New York Court Review of Children in Foster Care, 59 Child Welfare 211, 240 (April 1975)

For a discussion on the frequency of multiple placements of children in foster care and its harmful impact see Wald, State Intervention on Behalf of "Neglected" Children; Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, supra at pp. 645, 646, 669-671. "The frequency of multiple placements is perceived as one of the most severe deficiencies of the existing system." id at p. 646.

Having suffered the initial trauma of the disruption of their biological family, a disruption likely to be even more traumatic when accompanied by neglect, abuse or the mental illness of the parent, these children are being denied even the stability of remaining in long-term foster homes, free from the arbitrary and peremptory disruption.*

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* Appellants posit a situation in which the foster family is an alternative to an adoptive family. This need not be the case at all. If a foster family relationship is allowed to flourish and deepen, free from ill-considered and unnecessary dissolution, that foster family is the most likely adoptive resource for the child. See, e.g., the description of appellee Smith's efforts to adopt the Gandy children. In recognition of this fact, the state legislature has enacted a subsidized adoption program, New York Social Services Law §398.6(k) to enable suitable foster parents with low incomes to adopt their foster children and continue to receive some financial aid in lieu of foster care payments.

C. The Procedures for Removing Children From Foster Homes Declared Unconstitutional by the Court

When a foster child is placed by an authorized agency in an individual foster family home, the agency may remove the child at any time "in its discretion. . ."* This is true regardless of the length of time the child has lived in the foster home, (A. 291a) and regardless of whether the child is being moved to another foster care setting of any kind, or whether the child is being returned to a biological parent.

The initial decision to remove the child is made by a worker who need not have any special training in social work or psychology (A. 132a) and, who typically is at least the third or fourth worker on the case.**

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* New York Social Services Law §§383(2), (R.A. 1a).

** The high rate of worker turn-over among social workers is well-recognized. See Shapiro, Occupational Mobility and Child Welfare Workers: An Exploratory Study, 53 Child Welfare 5 (Jan. 1974). As part of his study, Prof. Fanshel notes a turn-over so high that within two and a half years 70 percent of the foster families had experienced a change in social workers. Fanshel and Grundy, Foster Parenthood: A Replication and Extension of Prior Studies, p.7, (April 1971).

All the foster families named as plaintiffs in this case had experienced several changes in social workers. The

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The decision to remove the foster child from what may be the only family he or she has ever known need not be discussed by the worker with the foster child, regardless of the child's age.* The decision and the basis for it may, however, be discussed by the worker with the

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> decision to remove the Gandy children from their home with appellee Madeline Smith was made by a worker new to her case and abandoned when a new worker was assigned subsequent to the commencement of this action. Appellee Dorothy Lhotan testified that during the four years the Wallace children were in her home, she had been supervised by three different case workers. (A. 302a) Appellee Christiane Goldberg testified:
>
> > "Every worker had essentially a different plan. Every time we change workers, they had a different opinion. Even the last worker first said he wasn't going to move him and then he said he was." (A. 297a)

* Twelve-year-old Cheryl Wallace testified that neither she nor her sisters had been asked whether they wanted to leave their foster home with appellees Mr. and Mrs. Lhotan prior to the time that the Nassau Children's Bureau notified the Lhotans of the removal decision. (A. 305a)

individual in the social services department who will later conduct the only pre-removal review available.*

The written notice sent to the foster parents contains no information about why the child is to be removed. At most, it may contain the printed statement that the removal is "in the child's best interests." See A. 37a, 134a, 281a In some circumstances, the agency may decide to completely withhold from the foster parents the real reason for the removal decision. In other circumstances the reason for the removal decision, or some portion of the reason, may be communicated informally to the foster parents by an agency worker. (A. 281a, 283a, 288a) Foster parents who wish to object to the removal may, under the challenged regulation,

> "request a conference with the soical services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed." 18 N.Y.C.R.R. §450.14 (R.A. 2a)

* The director of the Nassau Children's Bureau testified that the person holding the hearing provided by 18 N.Y.C.R.R. §450.14 would almost certainly have participated in the initial decision to remove the child. (A. 132a, 135a)

At the conference, the District Court found that the foster parents

> "may not present or cross-examine witnesses, nor may they inspect the agency files even if records contained therein formed the predicate for the administrative decision. Yet, despite these handicaps, the burden is upon the foster parents to submit 'reasons why the child should not be removed.' The agency, by contrast, has no countervailing obligation to provide an articulated rationale for removing the child. N.Y.C.R.R. §450.14. There is evidence in the record which indicates that rarely, if ever, do these pre-removal conferences result in the reversal of the initial decision." (A.J.S. 4a-5a)

Testimony in the record makes explicit that the conference is considered more an opportunity to explain the removal decision to the aggrieved foster parents than an independent review of the initial decision.*

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* "The functions of the conference is to give the foster parents every opportunity to present their views and reasons as to why they disagree with the agency's decision to remove the child and I would like to add also. . . if both the foster parents and the agency were in agreement, it would be a further opportunity for the department to interpret to the foster parents why the department had made that plan." (A. 135a)
(fn. cont'd on next page)

After the conference has taken place, §450.14 requires that a decision be made and a written notice sent to the foster family within five days. Three days thereafter, if the decision is adverse, the child may be removed from the foster home.

(fn. cont'd from preceding page)

> Subsequent to the initiation of this action, the New York City public child welfare agency, which is called Special Services for Children, modified its practices under §450.14 "in recognition that there are considerations of due process which should be protected in removal of children from foster family homes. . ." when a child is being removed to go to another foster care setting. (R.A. 54a) Special Services for Children continues to conduct conferences in which a child is to be returned to the biological parent in accordance with its former general practices, pursuant to §450.14:
>
> > "Q. Would you characterize the [conference held when the child is to be removed for a return to the biological parent] as more a time to explain to the foster parents why the child or children are being removed?
> >
> > A. Yes." (R., dep. of Retta Friedman, p. 22, docket entry #89)

Special Services for Children interpreted §450.14 as mandating no more than an explanatory conference at which agency representatives were not present, even when the child was to be moved to another foster care setting, See R., id. at pp. 19-21.

A full administrative review, a state-conducted fair hearing run in accordance with 18 N.Y.C.R.R. §358,is available to review the decision reached at the conference, see New York Social Services Law §400(2), §450.14(c),* but that review is available only after the child has been removed from the foster home. The fair hearing is available regardless of whether the child is being removed from the foster home to be placed in another foster care setting or to be returned to a biological parent.**

D. The Remedy Ordered by the District Court

The District Court held that "the pre-removal procedures presently employed by the state are constitutionally defective." (A.J.S. 10a) In a ruling limited to children who have lived in a foster home for one year or more, Judge Lumbard, writing for the court, ruled that

> "before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all

* 18 N.Y.C.R.R. §450.14(d), R.A. 3a.

** The state official responsible for supervising §400 hearings testified that "most involve cases where the agency has determined to remove the child and return the child to its natural parent. . ." A. 144a

> concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child." (A.J.S. 10a)

As recognized by the court, a hearing serves two crucial purposes: it "dispels the appearance and minimizes the possibility of arbitrary or misinformed action." (A.J.S. 10a) The court summarized the constitutional defects of the present pre-removal conference as follows:

> "the foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate." (A.J.S. 12a)

Furthermore, the court found that the availability of a post-removal "fair hearing" exacerbated rather than cured the constitutional violation found to exist. (A.J.S. 13a)

In examining the pre-removal procedures promulgated by the New York City public agency, Special Services for Children, during the course of the litigation, the court found "significant improvement" over the unconstitutional pre-removal conference, post-removal administrative hearing provided by the challenged regulation and statutes. However, even that attempt still presented constitutional deficiencies in the court's view:

Thus:

1. The review would only be provided upon request by the foster parent, rather than as a matter of course to protect the child's right "to avoid arbitrary dislocations;" (A.J.S. 15a)

2. The new procedure did not apply in those instances in which the child was being removed for a return to a biological parent, a distinction which ignored the fact that the child's "best interests" would always be promoted by a well-informed decision; (A.J.S. 16a)

3. The existence of New York City's pre-removal hearing and the state's post-removal hearing mandated by 18 N.Y.C.R.R. §450.14 was duplicative and contrary to the child's right to a speedy and final decision; (A.J.S. 16a)

4. The New York City review procedure limited participation to the foster parents and the agency representative, instead of permitting the biological parent and the child an opportunity to be heard as a part of the child's right to a well-informed decision. (A.J.S. 16a)

While setting forth these principles, the court carefully refrained from formulating any specific procedures which would be constitutionally mandated:

> "we believe the sounder course is to allow the various defendants--state and local officials--the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion."*

The court's final order** declares New York Social Services Law §383(2) and 400, and 18 N.Y.C.R.R. §450.14 unconstitutional as applied, but refrains*** from mandating the constitutionally required procedure for the hearings beyond

> "notice and hearing at which the foster parents, the foster child and the biological parents may

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* A.J.S. 17a.

** A.J.S. 36a-37a.

*** Appellants' repeated contentions that the court mandated full dress adversary hearings is flatly contradicted by the court's decision and order. The court held that the defendants should have the first opportunity to develop procedures consistent both with the constitutional guidelines in the decision and with professional knowledge. Moreover, the court specifically stated that it was <u>not</u> holding that "a trial-type hearing. . . is consitutionally requisite."

present any relevant information to the administrative decision-maker. . ."*

The court's order further required that a disinterested adult be appointed to represent the child at such a hearing under certain circumstances, and that defendants promulgate appropriate procedures in accordance with the opinion and order.**

Judge Lumbard, writing for the court, made it clear that the District Court ruling was a procedural one only, setting forth constitutional principles and guidelines to govern the decision-making process. The court noted that New York decisional law contained standards*** for determining the custody of children. A constitutionally-mandated hearing at which the standards could be applied would not, the court noted explicitly, disturb that "local judgment." (A.J.S. 11a)

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* A.J.S. 37a.

** A.J.S. 37a.

*** Appellants' doomsday forecasts that the court's decision will serve to destroy biological families and award custody of the children of the poor to their foster families is without basis or support, other than appellants' assertions about general malfunctions in the foster care system and society in general. Whether or not these assertions are true, they are irrelevant to the very narrow issue decided by the District Court.

SUMMARY OF ARGUMENT

Appellants have uniformly couched their arguments to this Court based on a patently misleading characterization of the nature of the New York foster care system. See Appellees' Statement of the Case, supra. Appellants argue that children being removed from foster homes in which they have lived for a year or more usually are bound for either their biological family's home or an adoptive home. Therefore, appellants argue, the District Court opinion not only fails to protect any cognizable constitutional interest, it also serves to thwart the state's policy, and constitutional obligation, to protect the biological family unit, and the state's interest in providing children with substitute permanent homes through adoption.

Appellants' legal analyses flow from, and their logic and relevance are dependent upon, these false and unsubstantiated premises.

Appellees readily concede, and have throughout this litigation, that the biological family unit has been and should be afforded constitutional protection, and should be disrupted only when absolutely necessary. Appellees further agree that the foster care system in New York is intended to provide only temporary care to foster children, until they can be reunited

with their biological family or provided with a substitute permanent family through adoption. However, appellees do not accept the freedom shared among the appellants to ignore either the facts concerning their own situations, or the evidence contained in this record.

The biological families of the children in this lawsuit have already been disrupted for at least a year; in most instances the biological parents are strangers to the children.

Foster care in New York is not a temporary situation for most children. Once they have been in foster care for a year or more, foster care is likely to become a long-term arrangement.

Appellees' legal arguments will be based, therefore, on the facts concerning their foster care situations, and the evidence in this record upon which the three-judge District Court based its opinion.

The District Court held that once the biological family has been disrupted and a child has been a part of a foster family for a year or more, a protected interest in that relationship has been created with which the state may not constitutionally interfere arbitrarily or peremptorily, and that existing procedures do not provide even minimal due process protection for that interest. Therefore, the District Court ordered the defendants to formulate procedures to insure that a child not be removed for a foster home without notice and a hearing at which foster parents, the

foster child and the biological parent may present any relevant information to an impartial decisionmaker.

Appellees maintain that the District Court opinion was correct and should be affirmed by this Court. Decisions regarding the lives of children are admittedly subjective, based on non-quantifiable information from a variety of sources, and usually involve disputed facts. However, it is in the interests of all parties* that such decisions be made on the basis of all available information and as fairly, carefully and expeditiously as possible.

* These parties include the state, charged with the responsibility for protecting the child; the biological parent, who regardless of ability to perform a caretaking function can nevertheless be presumed to have vital concern for the child's well-being; the court-appointed representative for the child; and the foster family, parents and child.

POINT I

THE DISTRICT COURT OPINION CORRECTLY RECOGNIZED A CONSTITUTIONALLY PROTECTED INTEREST REQUIRING DUE PROCESS PROTECTION.

The opinion of the district court below is a narrow, limited procedural holding: that the decision to remove a child from a foster home in which he or she has lived for more than one year is a critical decision affecting a constitutionally protected interest and relationship which may not be made without a prior hearing at which all parties have an opportunity to be heard.

Whether disruption of a child's relationship with a foster family is viewed as a withdrawal of a benefit conferred by the state or as an infringement of the child's inherent right to liberty,the state may not act arbitrarily, peremptorily or without due process of law. The three-judge district court ruled that

> "it is by now well-settled that children are 'persons' within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement. In re Gault, 387 U.S. 1 (1967);Tinker v. Des Moines School District, 393 U.S. 503 (1969); Gross v. Lopez, 419 U.S. 565 (1975). Foremost among those rights, as the Supreme Court has repeatedly held, is the right

> to be heard before being 'condemned to suffer grievous loss,' Joint Anti-Fascist Committee v. MCGrath, 341 U.S. 123,168 (1951) (Frankfurter, J., concurring)." (A.J.S. 10a)

A. The Nature of the Protected Relationship

The District Court recognized, based on an impressive array of evidence and on the basis of "our common past"* that

> "the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment. This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parent." (A.J.S. 11a)

As the court noted,

> "Neither defendants nor intervenors dispute the strength of the emotional ties binding plaintiffs and their foster children or the loss that will be felt if those ties are severed." (A.J.S. 7a)

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* A.J.S. 11a.

The District Court found that the basis for the right to be afforded constitutional protection was obvious: "the harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent."* They are also well-documented in the record below.**

Dr. Stella Chess, head of the department of child and adolescent psychiatry at the New York University Medical Center, the author of five

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* A.S.J. 10a-11a.

** Prof. Fanshel, who found no statistically significant correlation between the number of times a child was moved and the child's successful development, readily conceded that his study was not designed to study such phenomena in depth. His opinions were also shaped, inevitably, by his view that a functioning biological parent has an absolute right to determine when to resume custody of a child. (R., dep of Prof. Fanshel, pp.62,125-126, 180, docket entries # 93,94).

psychiatry texts and a practicing child psychiatrist for 32 years, testified that significant emotional attachments were possible between foster parents and child, identical to the attachment that could exist between biological parent and child, and that the existence of a biological relationship was not the key determinant. (A. 121a). See also testimony of Dr. Marie Friedman, A. 263a-265a.*

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* Dr. Albert Solnit, Sterling Professor of Pediatrics and Psychiatry at Yale University, director of the Child Study Center in New Haven, Conn., and president of the International Association for Child Psychiatry and Allied Professions, described the development of the foster family relationship when it exists for a period of time which is lengthy when judged by a child's sense of time:

> "These children feel that this is my mommy and my daddy, foster parents, and this is their home and they build their lives on the basis of the daily contact, the daily attachment, the daily feelings of love and sense of protection, the sense of feeling wanted and feeling an unqualified commitment from the parents. These are the criteria for establishing what we call the psychological parent that has been established and is maintained." (A. 214a).

Three distinguished psychiatrists specializing in child and adolescent psychiatry, all with experience treating foster children, attested to the devastating impact of an unnecessary removal of a child from a foster home in which the child had lived for a year or more, even if the child were being moved to new living situation which was objectively desirable.* Dr. Chess testified:

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* Appellant Rodriguez argues in her brief, Point III, that the class certification was improper because the named plaintiff foster children are not completely representative of all foster children within the certified class. Complete representativeness is not required by Rule 23, Fed. R. Civ.P. Moreover, contrary to appellant's assertion, two of the plaintiff foster children, Cathleen and Cynthia Wallace, had been in their foster home less than two years. Cheryl, Cynthia and Cathleen had seen their biological mother only months before being joined as plaintiffs in this action. (R. affidavits of Dorothy Lhotan and Cheryl Wallace, dated July 3, 1974, paragraphs 8 and 9, and 6, respectively, submitted in support of Order to Show Cause for temporary restraining order, docket entry # 16).

Appellant Rodriguez's argument is, once again, based on a confusion between the decision-making process and the decision-making standard.

> "Repeated removal of a child from one situation to another, even if they are basically good situations ... are highly likely to deprive the child of an ability to form close relationships, to internalize a sense of right and wrong of rules, and to develop a real concept of empathy and give-and-take of human relationship of a meaningful nature." (R. dep of Dr. Chess, p.26, docket entry #135).*

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* "[I]f the child is taken out of the home suddenly for a long period of time beyond their tolerance of being able to remember or to feel the security of the previous parents, it has a devastating effect.

"We have studied child after child in which this devastation registered, a loss of developmental progress that can be quantified within the area of speech, in the area of motility, in the areas of skills and competence." Testimony of Dr. Solnit, A. 220a. See also testimony of Dr. Solnit, A. 213a-215a, 224a-225a; Dr. Chess, A. 122a-123a, 124a, 125a, 127a, deposition at pp. 57,58,60 (R., docket entry #135); testimony of Dr. Friedman, A. 265a-268a.

Judge Edward Lumbard, writing for the three judge court, found it significent that even defendant-intervenors' witness, Prof. David Fanshel, testified "as a professional," that he would be against capricious movement of children,"* and the court noted, "the requirement of a hearing is designed to insure no more."**

The decision by the court assiduously avoids comment on the standards which should be utilized at the constitutionally mandated hearing. While noting the debate concerning what weight should be given to the existence of a psychological family relationship, as discussed in Beyond the Best Interests of the Child, by Drs. Joseph Goldstein, Anna Freud and Albert Solnit (1973),the court correctly holds that the decision-making standard, as compared to the procedure involved in a hearing, is a local judgment,*** to be determined

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* A.J.S. 11a.

** Id.

*** The constitutionally-mandated hearing has acquired even greater importance in New York since the ruling of the three-judge court. At the time of the District Court's decision, the law in New York was, indeed, clear in a custody dispute between a biological and foster parent: "in the absence of abandonment, formal surrender for adoption or demonstrated unfitness, the 'primcy of parental rights may not be ignored.'" Therefore, Judge Lumbard's opinion

(fn. con't on next page)

by the state.* The district court was not attempting to tamper with such local judgments, as appellants' somewhat

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(fn. cont'd from preceding page)

explained, when a child was to be removed for a return to a natural parent the hearing would be limited to such issues as whether the biological parent had been visiting the child and whether the parent was presently fit.

New York law has now been made substantially less clear, and perhaps reversed. Appellants cite Bennett v. Jeffreys, 40 N.Y. 2d 543,387 N.Y.S. 2d 821 (1976), see, e.g., brief of appellant Rodriguez p.68, but fail to mention that the unanimous Court of Appeals created a substantial exception to the then-prevailing New York rule, and reversed a custody award made to a fit biological parent who had neither abandoned nor surrendered her child for adoption. Bennett held that the primacy of the biological parent's right would become secondary when weighed against such "exceptional" circumstances as "persisting neglect ... and unfortunate or involuntary disruption of custody over an extended period of time." Bennett v. Jeffreys, supra, 387 N.Y.S. 2d at 824. In a memorandum decision written three months later, the Court of Appeals acknowledged that Bennett had "overturned" the existing "ratio decidendi." Matter of Sanjavini K. v. Usha K., supra.

* A.J.S. 11a.

The District Court was not attempting to tamper with such local judgments, as appellants somewhat hysterically predict.*

The hearing mandated by the District Court is designed solely to ensure that placement decisions are based upon a fair and careful evaluation of all the relevant information. Thus, rather than interfering with the standards New York has established for determining the placement of foster children, the decision merely seeks to ensure that those standards are applied as carefully and as accurately as possible.

B. The Constitutional Basis for the Hearing Mandated by the District Court

The constitutional basis for the hearing mandated by the District Court derives both from this Court's interpretation of the nature of liberty** protected by the due process clause of the Fourteenth Amendment and from the individual's right to be free from arbitrary state interference or withdrawal of a state-provided benefit. The right to procedural due process of law does not depend on whether it is the individual's right or his privilege which is being subjected to arbitrary state intervention. Shapiro v. Thompson, 394 U.S. 618 (1969), Goldberg v. Kelly, 397 U.S. 254,262 (1970).

* See,e.g. brief of appellant Rodriguez, pp.72,85; brief of appellant Candy, pp. 17-18;brief of appellant Smith, pp.17-19. But see A. 293a.

** For judicial recognition of the constitutional protections which should be accorded the foster family relationship, see James v. McLinden, 341 F.Supp. 1233 (D. Conn. 1969).

As this Court recently stated, in Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18, 32 (1976):

> "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552 (1965)."

1. The Liberty Interest

Foster children who have lived in a foster home for a year or more have a sufficient liberty interest in the foster family relationship to have that relationship protected from arbitrary disruption by the due process clause of the Fourteenth Amendment. The interest is based on the rights encompassed within the First, Ninth and Fourteenth Amendments.

> "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth, 408 U.S. 564,572 (1972). See also Goss v. Lopez, 419 U.S. 565 (1975); Palko v. Connecticut, 302 U.S. 319 (1937); Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Illinois, 405 U.S. 645 (1972); Huntley v. Community School Board of Brooklyn, 543 F. 2d 979 (2d Cir. 1976).

This Court has long recognized the importance of the family relationship as a cornerstone of the evolving interests, rights and liberties which the Bill of Rights was intended to protect See e.g., Loving v. Virginia, 388 U.S. U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Prince v. Massachusetts, 321 U.S. 158 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Increasingly, looking more to reality instead of theory to determine exactly what interests were in jeopardy, this Court has protected such rights and relationships, regardless of whether or not they developed within the confines of traditional, statutorily-defined structures, Stanley v. Illinois, supra, 405 U.S. at 650; Levy v. Louisiana, 391 U.S. 68 (1968); In re Gault, 387 U.S. 1 (1967).

Thus, in extending due process rights to the father of illegitimate children, even though the state of Illinois did not recognize him as a legal parent, this Court recognized that it was the emotional and psychological content of a parent-child relationship, and not its legal status,that gave rise to a protected constitutional relationship. Stanley v. Illinois, supra, 405 U.S. at 650.

After a year or more of living together, foster children and their foster parents can develop emotional ties with each other which may be as "warm, enduring and important as those arising within a more

formally organized family unit." Stanley v. Illinois, supra, 405 U.S. at 652. The child's right to have the relationship free from arbitrary state disruption cannot be made dependent on the status of those who produced or seek to raise him. Levy v. Louisiana, 391 U.S. 68 (1968).*

The liberty interest at stake in this case is of crucial significance. It is a child's interest in maintaining the emotional and psychological relationship with care-taking adults who give the child his or her sense of security and identity. Surely, the concept of "liberty" includes a child's interest in maintaining such a fundamental relationship.

Though that interest is anything but absolute, it is an interest of sufficient magnitude that it is protected by the Fourteenth Amendment from arbitrary and capricious impairment by government officials. Surely this Court has never denied the protection of the due process clause to government deprivation of an interest of a similar magnitude.

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* Nor does the fact that the state purports to always act in the child's best interests defeat the right to have such a crucial interference in a child's life protected by due process of law. Good motives do not guarantee fairness, an absence of bias, or even carefully considered decisions. In re Gault, supra.

State appellants argue that this Court's rationale in Meachum v. Fano, 427 U.S. ____, 49 L.Ed.2d 451 (1976), should be applied to defeat the due process right in the present case. In Meachum, this Court held that the due process clause does not require procedural safeguards when a prisoner is transferred from one prison facility to another. Viewed either from the standpoint of the liberty interest theory of due process, or the property-entitlement theory, see discussion infra, Meachum is totally inapplicable to the case.

In Meachum, this Court held that a prisoner's liberty interest is extinguished by a valid conviction which, under the circumstances of that case, empowered the state to confine him in any of its prisons. In urging that Meachum defeats the claim of foster children to a liberty interest in a foster family relationship, appellants necessarily suggest that children in foster care have no greater liberty interests than convicted prisoners. Such an argument is totally inapposite to the present case

This Court need not reach the question of whether the liberty interest of the foster child in the long-term foster family relationship should be equated with the liberty interest in a biological family relationship.

The District Court below eschewed reaching such "interesting," "important," and "considerably. . .difficult" questions* as the definition of the family and whether the foster home should be accorded the same protection as the more traditional family unit based on biology.

Instead, the court based its decision on far narrower grounds, holding that the decision-making process was sufficiently important, and its impact on the life of the child affected of sufficient consequence, that as a matter of constitutional right a child could not be removed from a foster home without a prior hearing which satisfies the requirements of the due process clause of the Fourteenth Amendment.

2. The State-Created Benefit

This Court may affirm the decision of the District Court, however, without deciding whether the "liberty" that is protected by the due process clause encompasses a child's interest in the foster family relationship.

As this Court recently restated in Meachum v. Fano, supra, important state-

* A.J.S. 8a-9a.

created benefits are also entitled to the protection of the due process clause to insure that such benefits are not "arbitrarily abrogated." Meachum v. Fano, supra, 49 L.Ed.2d at 460, citing, Wolff v. McDonnell, 418 U.S. 539, 557 (1974). See also Goldberg v. Kelly, supra; Bell v. Burson, 402 U.S. 535 (1971); Perry v. Sinderman, 408 U.S. 593 (1972).

A child's relationship with his or her foster family is just such a state-created benefit. The state of New York has chosen to provide the great majority of children for whom it has assumed responsibility with the benefit of living in an individual foster home and forming a relationship with adults the state has approved as suitable foster parents. See Point I, A, supra.*

* The director of a large New York City child-care agency testified:

"We have a very positive opinion about foster family relationships. We work very hard to make those relationship[s] very close so that the child will have. . .good care and close care. . .

"Also if it's not possible for him to be returned to his natural parent or placed in an adoptive home outside of the foster home, working in a family centered way with the foster parents and bringing--helping to bring about a close relationship, benefits the child in maintaining a home for him that will be personal one." (A. 290a)

The state's frequently expressed legislative goal* is to provide permanence and stability to children in foster care. Foster parents are persons with unique abilities to form warm relationships to children.** For a child dislodged from a biological family, placement with a foster family, is "the best available substitute for the actual family structure." Ramos v. Montgomery, 313 F.Supp. 1179 (S.D. Cal. 1970) (three judge court) aff'd mem. 400 U.S. 1003 (1971)***

* Barriers, supra, p.18, brief of state appellants, p.4

** A. 290a

*** State appellants urge that Meachum also defeats any entitlement interest in the foster family relationship requiring due process protection. Massachussetts did not necessarily intend to convey a benefit upon prisoners by placing them in one prison rather than another. Here, on the other hand, the defendants do not deny that foster care placements are intended to serve the interests of the child. It is instructive to note, however, that state appellants, charged with responsibility for the well-being of children, press the Meachum analogy, thereby suggesting that one foster parent is indistinguishable from another, and that a child's relationship to a foster parent who has nurtured the child for more than a year is comparable to a prisoner's relationship to the place of his confinement.

In short, the state provides a foster child with the benefit of an approved, licensed, supervised foster family with the recognition and expectation that the relationship which will develop between foster child and foster family will be valuable to the child. Removal of a child from a foster home in which the child has lived for a year or more, and by which time the foster child and parent(s) are likely to have formed a significant relationship*,constitutes a withdrawal of an important state-provided benefit.

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* Indeed, in recognition of the significance of a particular foster family relationship, the state has provided foster parents with increasing rights in their relationship with their foster child, see, e.g. New York Social Services Law §383(3), (R.A. 4a). These new-created rights do not, however, effect the issues in this lawsuit. See Point II, infra.)

POINT II

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CHALLENGED NEW YORK PRACTICES AND PROCEDURES FOR REMOVING FOSTER CHILDREN FROM FOSTER HOMES DO NOT SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE.

The District Court decision relied on this Court's traditional and recently reaffirmed view of the protection provided by the due process clause to hold that government action resulting in concrete loss or harm will give rise to due process safeguards under the Fourteenth Amendment. Paul v. Davis, 424 U.S. 693, (1976);* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goss v. Lopez, supra; Goldberg v. Kelly, supra.

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* In Huntley v. Community School Board of Brooklyn, 543 F.2d 179 (2d Cir.1976) the Second Circuit found that the due process clause had been violated, citing Board of Regents v. Roth, supra, and emphasized that the holding in Paul v. Davis, supra, merely distinguishes between remote harm caused by officials abusing their power and harm arising out of the exercise of official responsibilities.

Once it has been determined that the due process clause applies, the determination of how much process is due depends on the circumstances of the particular case and

> "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886,895 (1961); Goldberg v. Kelly, supra, 397 U.S. at 263.

A. The Constitutional Inadequacy of the Challenged Procedures

State appellants argue that existing procedures satisfy due process requirements, particularly since there are no antagonistic interests between the child and the decisionmakers.* Therefore, the state argues,either the due proces clause does not apply or, if it does, the procedures declared unconstitutional by the district court satisfy whatever due process interest

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Appellant Shapiro's brief, pp. 28-29

there might be. Antagonistic** interests have never been a prerequisite for finding that due process rights exist,*** although they may play a role in determining what procedure is constitutionally mandated.

** In the present case, public money is conserved by a decision to remove a child from a foster home and return the child to his or her biological parent. Even if the biological parent receives federal Aid to Families with Dependent Children, that amount is less than the amount expended for foster care. Ramos v. Montgomery, supra. In that sense, an agency worker has an interest antagonistic to making the best possible decision for the child, in the same sense that a welfare worker may have had in Goldberg v. Kelly, supra. Appellees cite this example only to demonstrate the insubstantiality of such an argument, and not to suggest that such an "antagonism" is a relevant factor.

*** Thus in Goldberg v. Kelly, supra, the welfare worker making the decision to terminate benefits could be said to be antagonistic in the sense that he or she was concerned with improper expenditure of public money but that worker also had a competing interest, that of ensuring that needy and eligible recipients received the financial assistance to which they were entitled. Nor did the state have any particularly antagonistic interest in suspending a driver's

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In weighing the procedures in practice in New York,* the District Court relied on factors recently emphasized by this Court in Mathews v. Eldridge, supra. In Mathews, the Court

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license in Bell v. Burson, 402 U.S. 535 (1971); or in unreasonably evicting a particular family from public housing, Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. denied 400 U.S. 853 (1970); or in a teacher's unnecessarily suspending a student, Goss v. Lopez, 419 U.S. 565 (1975).

* Court-appointed counsel for the children, while arguing that no due process rights should have been recognized by the District Court, concedes that the challenged New York procedures contained in 18 N.Y.C.R.R. §450.14 "do not meet all the requirements of due process." Appellant Gandy's brief, p. 14.

readily acknowledged that procedural due process applied to termination of social security disability benefits; the issue was what process was due. In reaching its determination, the Court, Mathews v. Eldridge, supra, 47 L.Ed 2d at 33, set out a three-pronged test: the private interest affected by the government act; the risk of incorrect deprivation and the degree to which better procedures would alleviate risk, and the governmental interest involved.

In Mathews v. Eldridge, supra, the neutral nature of the information to be assessed prior to termination of disability benefits, the availability of adequate review procedures subsequent to termination, and the provision for full retroactive payment satisfied due process requirements. In the present situation, the District Court considered the three elements of this test and found that each of them supported a finding that present New York procedures failed to satisfy constitutional due process requirements. The interest affected in the present case is a critical one, the child's interest in a state-created family relationship which has been in existence for a year or more. See Point I, supra.

The District Court concluded that the information to be assessed in determining whether to disrupt that relationship is often anecdotal, subjective, gathered from a variety of sources, not fully available, conflicting,

and "some of it biased." (A.J.S. 20a, fn. 13a).* Nor are there any specific written criteria to guide the decision-making process.**

In Mathews v. Eldridge, supra, the decision to be made was based on a very narrow inquiry, one particularly suited to written submissions, in contrast to a decision for which a prior hearing is constitutionally mandated, such as the one in the present case, in which "a

* For example, if appellee Madeline Smith had had an opportunity to present all relevant information at a full and fair hearing, the agency's decision to remove the children from her foster home would have been reversed. The Family Court judge hearing her application to adopt the children, (R.A. 116a) did not suggest the children be removed from her home, nor has the agency made any such suggestion since a new worker was assigned after the commencement of this lawsuit.

** A, pp. 281a, 288a.

wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process." Mathews v. Eldridge, supra, 47 L.Ed 2d at 38, citing Goldberg v. Kelly, supra, 397 U.S. at 269.

The Court in Goldberg v. Kelly, supra, recognized that due process protections are necessary because government decision-makers, no matter how benign and well-motivated, can make mistakes. Due process protections tend to minimize these mistakes by guaranteeing that as much information is presented as possible, in as fair and unbiased a procedure as feasible.

> "In almost every setting when important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." id at 269.

In Goldberg v. Kelly the Court said, id at 270, citing Greene v. McElroy, 360 U.S. 474, at 496-479 (1959):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual

so that he has an opportunity to show that it is untrue."

The evidence in the record indicates the concern that several eminent psychiatrists share about how agencies decide when to remove children from foster homes and their familiarity with the mistakes made in the absence of a more reliable decision-making process.

When asked about her familiarity with the decision-making process in New York agencies, Dr. Marie Friedman testified:

> "Q. Do you have any experiences with the decision-making process in these agencies? A. I do, and I don't like to say it, but the fact is that this is an area of enormous distress to those of us dealing with psychiatric problems and child development problems.
>
> Q. Could you tell us why? A. I really wish I knew the answer. I can only describe what goes on. There can be a dossier ten inches thick on a youngster. It can have information beyond what anyone needs to make any kind of a decision, and either it isn't read or it isn't understood, and all kinds of action goes on in terms of moving kids around inappropriately without regard to the already compiled information or to

> . . .recommendations that supposedly they come to us for.
>
> There is a kind of - I am sure it is based on some good intentions, a sense of ownership as far as children are concerned." (A, 268a-269a).* See also R., dep. of Dr. Albert Solnit pp. 34-35, docket entry #137; testimony of Dr. Stella Chess, A., 127a.

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* "There is substantial evidence. . .that many public social work agencies have untrained or poorly trained staff.[74] Turnover among caseworkers is very high. [fn. omitted] Record-keeping is sometimes so bad that case records do not even permit continuity of treatment among workers, let alone outside evaluation of effectiveness.

74. . .
According to an amicus brief submitted on behalf of the Social Service Employees Union, Local 371, AFL-CIO, the union for New York City social workers, 'caseworkers are either badly trained or untrained' and are likely as well to be 'young and inexperienced.' Quoted in Wyman v. James, 400 U.S. 309, 322-23 n. 11 (1971)." Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stanford Law Review 985, 998 (April 1975).

The agencies themselves, of course, believe their decision-making process to be adequate and without the necessity for review.*

* In recognition of the fact that thousands of children were growing up in "temporary" foster care, their relationship with their biological parents effectively severed even if not formally terminated, with no effort being made to find adoptive homes for them, the New York State legislature enacted New York Social Services Law §392 in 1971. The purpose of the law is to review the status of children in foster care; it does not affect the issues in this case, see discussion, infra. Yet in spite of the well-documented failing of agencies to put the theory of foster care into practice, see, e.g., Bellisfield, Allen and Hyde, Census of Children in Care Who May Need Adoptive Planning, (1971), prepared for the New York City Department of Social Services, the agencies vigorously

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A carefully-documented report on children in New York, prepared by the Foundation for Child Development, State of the Child, supra, expresses skepticism about the ability of child-care agencies to assess themselves, pointing to the contrast between findings concerning the appropriateness of placement prepared by Professor David Fanshel and based on assessment data supplied by the agencies themselves and the findings in a study "commissioned by the [New York] State Board of Social Welfare, employing professionally developed criteria and expert readers"* which came to very different conclusions. The report stated,

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> resisted any attempts at limiting or reviewing their complete and total discretion.
>
> > "The enactment of Section 392 was accomplished over the virtually unanimous protestations of child care agencies and social services officials throughout the State. It made the Court an instrument of accountability in this State, necessitated in part by the failure of social servcies agencies to effectively monitor the progress of children in their care." Barriers, supra, at p. 14.

* State of the Child, supra, pp. 68-69.

"Clearly, those who work in child-caring agencies have a more optimistic perspective than do outside researchers."*

Two directors of large New York City child-care agencies testified that decision-making with regard to what was best for a particular child could reasonably be the subject of disagreement.** It is therefore of crucial importance that all relevant information, including conflicting opinions and judgments, be presented to an impartial decision-maker who can weigh the facts and determine which opinions are based on sound and reliable information.

Judge Lumbard, writing for the three-judge district court, concluded that

> "the state in its parens patriae capacity, will be better able to make an informed decision after a hearing at which all relevant information has been presented.

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* State of the Child, supra, p.68.

** A. 284a, 291a. There have been no studies on the number of instances in which children have been unnecessarily removed from foster homes. However, Prof. Fanshel's study shows that 10 percent of the children who left foster care and were returned to their biological parents had to be returned to foster care,with some

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> . . .
> Plainly, the present pre-removal conference is not designed adequately to fulfill this data gathering function." (A.J.S. 12a)

Although the post-removal conference provided by 18 N.Y.C.R.R. §450.14(e) and New York Social Services Law §400 more adequately fulfills a data-gathering function,* the District Court recognized that post-removal procedures cannot possibly make a child who suffers the trauma of an unwarranted separation whole again,** unlike the person who

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children experiencing four returns home and three reentries into foster into foster care. A. 179a.

* It does not provide any representation for the foster child and is dependent upon the request of the foster parents, both defects of constitutional significance, in the opinion of the District Court.

** There was virtually no disagreement among the expert witnesses that it would be contrary to the best interests of a child to be removed from a foster home while there was a possibility that the removal decision would be reversed by a subsequent decision. New York Social Services Law

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has been denied disability benefits. Mathews v. Eldridge, supra. Indeed such post-removal review inflicts unnecessary pain and uncertainty on all parties involved and serves no conceivable interest.

Finally, Mathews looked to the governmental interest involved in determining whether a hearing prior to termination of disability benefits was constitutionally mandated. In the present case, the governmental interests militate most vigorously in favor of as full a review as possible prior to the removal of a child for whose welfare the state is responsible. In most instances, premature, precipitous removal does not even conserve governmental funds, since the child is likely to be removed to be placed in another foster care setting. See Statement of Case, supra. Even when viewed strictly in fiscal terms*

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§400 and 18 N.Y.C.R.R. §450.14(c), both declared unconstitutional by the court, provided for post-removal administrative review. See R., testimony of Florence Kreech, hearing tr., p.69; dep. of Dr. Stella Chess, pp.57-58; dep. of Dr. Albert Solnit, p.32.

* The cost of due process has never been held to be an adequate reason for denying it when constitutionally required. Goldberg v. Kelly, supra, 397 U.S. at 261; cf. Reed v. Reed, 404 U.S. 71 (1971).

the costs of providing additional* hearings are difficult to weigh as against the more remote but still fiscally significant costs of providing psychiatric treatment, remedial help, welfare benefits or even incarceration for those foster children grown to adulthood and too scarred by the instability of repeated foster care placements to function as productive citizens or parents.

The state, charged as it is with responsibility for both the emotional and physical well-being of foster children, has no conceivable interest in opposing procedures better calculated to provide such significant decisions with a greater degree of reliability.

* It is impossible to determine at this juncture just how many children would be removed from foster homes in which they have lived for a year or more if, in accordance with the district court's decision, agencies realized that all removal decisions would have to be rationally and factually justified to an impartial decision-maker. The agency's internal reversal of its decision to remove the Gandy children from their home with appellee Madeline Smith provides a good example.

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Anti-Fascist Committee v. McGrath, supra, at 170, 171-172, . . . (Frankfurter, J., concurring).'" Goss v. Lopez, supra, 419 U.S. at 580.

B. The Constitutional Inadequacy of Other Available Proceedings

As another attempt to thoroughly obfuscate the very simple issue before this Court, appellants argue that even if due process protections apply to the foster care removal situation, and even if the challenged administrative procedures fail to satisfy constitutional due process standards, New York Social Services Law §392 provides adequate due process protection. Indeed, appellants argue, the District Court was performing an impermissible legislative function,* since its decision mandates

* Court-appointed counsel Buttenwieser's brief asserts that the District Court's decision conflicts with a recently enacted New York statute, New York Social Services Law §384-a. That statute provides that the authorized agency shall return a voluntarily-placed child to the biological parent, if

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due process after a child has been in a foster home for one year while §392 affords the same protection after 18 months. This argument is belied by the clear language of §392, the New York cases applying that statute, and the record in this case.

The District Court opinion found that §392 did not adequately satisfy the due process rights of foster children. Most fundamentally, the court held, §392 is inadequate because hearings under that section do not take place automatically upon the planned removal of a child, but only at specified time intervals or when sought by the foster parent, thus making the child's constitutional right to a hearing prior to removal dependent upon invocation by a third party.*

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specified events have taken place or conditions fulfilled, unless the agency decides it should seek a court order depriving the parent of custody. The District Court's decision merely provides a procedure to insure that all such determinations by the agency are made carefully and based on all the available and relevant information.

* The court found that the revised administrative removal procedure prepared by the New York City defendants subsequent to the commencement of this litigation suffered the same constitutional defect. The New York City procedure also suffers another fatal constitutional defect; it exempts those removal decisions in which the child is being returned to a natural parent. (A.J.S. 14a).

Of equal significance is the fact that a proceeding under §392 simply does not affect whether a child remains in a particular foster home. The District Court, in rejecting appellants' reliance on §392, characterized it as "an unjustifiably expansive interpretation of §392." (A.J.S. 14a). The Family Court before which a §392 petition is brought may only order:

> "a - continuation of foster care
> b - continuation of foster-care with a direction that proceedings be taken to legally free the child for adoption;
> c - continuation of foster-care with a direction that a legally free child be placed for adoption;
> d - discharge of the child to the biological parent."
> In re L., 77 Misc.2d 363, 353 N.Y.S.2d 317 (N.Y. Fam. Ct. 1974)

The limited jurisdiction of these proceedings is well-settled. The issue of whether a child* continuing in foster

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* As part of the argument that §392 provides an adequate remedy for foster children, the brief filed by court-appointed counsel for the children asserts that "the child is present during the proceedings..." and "the children are represented by Law Guardians." Appellant Gandy's brief, p.6. Unfortunately, these assertions are incorrect. There is no New York statutory requirement that

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care can be removed from a particular foster home is not an issue which can be reached in a §392 proceeding. In re W., 77 Misc.2d 374, 355 N.Y.S. 2d. 245 (N.Y. Co. Fam. Ct. 1974).* Appellants have

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a child be represented by a law guardian at a §392 proceeding, unlike at a neglect, abuse, persons in need of supervision or delinquency proceeding, see New York Family Court Act §249, although such a statutory requirement has been recommended. See Barriers, supra, pp.xiv, 9. Furthermore, a study of these proceedings found that the child is almost never present. Festinger, The New York Court Review of Children in Foster Care, 59 Child Welfare 211,213 (April 1975).

* "The only one of these [four possible dispositions] which might be considered to affect in any way the status of a party before it, is that which directs return of a child to its natural mother. Even this point is arguable. However, there can be no dispute that in spite of the fact that foster parents are given the right to participate as parties herein, no authorized disposition in these proceedings can effectuate any rights in their favor. [fn.] A separate statutory scheme has been enacted for foster parents who feel aggrieved by the actions of an

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failed to cite any cases holding to the contrary. In most instances, the order of disposition which the court enters is "foster care continued,"* the situation in which the agency remains free to peremptorily remove a foster child from a particular foster home subject only to the constitutionally inadequate procedures contained in New York Social Services Law §383(2) and 400 and 18 N.Y.C.R.R. §400.14.

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> agency removing children from them in S.S.L. §400... In short the only statutory scheme which enables a foster parent to obtain positive redress from the Courts against an agency calls for proceedings outside this Court. Logically then, the foster parents' right to participate in these proceedings as parties guaranteed by §392 is futile, of no effect and constitutes an expenditure of Court time to no avail and a waste of the foster parents' energies and emotions." In re W., supra, at 248-9

The court in a footnote summarized the significance of a disposition to continue foster care:

> "[foster care continued leaves] the situation in limbo subject to a 'contract' for foster care between foster parent and agency the latter being itself a subcontractor for care between itself and the Commissioner under the terms of which the child can be removed at any time;..." id. 355 N. Y.S. 2d at 248, n.2

* Barriers, supra, Appendix II, p.7.

Appellants also refer to the availability of state court habeas corpus jurisdiction as adequate to remedy the constitutional defects in New York's procedures for the disruption of the foster family relationship. It is doubtful whether habeas corpus jurisdiction could be invoked until after the child has been removed from the foster home, and it is, at best, unclear whether foster parents have any legal basis for acting as petitioners in such a proceeding. Foster children whose constitutional rights the District Court found to be in need of protection cannot in most instances be expected to take the initiative necessary to seek affirmative judicial relief.* The possibility of extraordinary judicial remedies has never been held adequate to satisfy interests entitled to due process protection.

The decision of the District Court was based on a voluminous record, including the testimony of distinguished experts in the field of child development. Appellants

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* In most instances, see e.g., New York Civil Practice Law and Rules §7801, state court proceedings could not be brought until after administrative remedies - in this case, the post-removal fair hearing provided by §400 - had been exhausted.

contend that conflicting social theories are at issue in this case; the District Court took note that important social theories had been raised but ruled that such issues need not and should not be reached by the court at this time.

Judge Lumbard's opinion for the three-judge court refrained from any holdings affecting such substantive issues as the standard to be used in determining a child's custody, describing that issue as a matter of local judgment in New York. The court merely looked to the New York procedures and applied well-recognized principles of procedural due process. The court held that the procedures for removing children from foster homes in which they have lived for a year or more are so inadequate as to not provide even minimal due process safeguards, and that the serious harm which is likely to result from precipitous and unnecessary removal cannot be cured by the availability of post-removal procedures. This narrow ruling should be affirmed by this Court.

POINT III

THERE IS A JUSTICIABLE CASE OR CONTROVERSY BETWEEN THE PARTIES WITHIN THE MEANING OF ARTICLE III, §2 OF THE UNITED STATES CONSTITUTION.

A. Case or Controversy

This case presents a live controversy between the foster children, who seek a hearing before they may be separated from their foster parents, and the defendants, all of whom oppose such hearing. That the children seek the pre-removal hearing which the District Court held was owed them as a matter of due process is clear from the record. Their pleadings requested such relief, and the oldest of the children named as plaintiffs and representatives of the class testified that she desired it.

The complaint in this lawsuit seeks to have New York Social Services Law §383 (2) and 400, and 18 N.Y.C.R.R. §450.14 declared unconstitutional on behalf of plaintiff foster children as well as plaintiff foster parents, and seeks to

> "Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year without the due process safeguards of adequate and specific notice and a prior hearing which satisfy the due process requirements of the Fourteenth Amendment. . ." (A. pp. 35a, 36a)

Plaintiff Cheryl Wallace, a 12-year-old foster child, alleged in her affidavit in support of the application to join the Wallace foster children and their foster parents, Mr. and Mrs. Lhotan, as plaintiffs in this action, that

> "11. I spoke to Marcia Lowry [originally counsel for plaintiff foster parents and foster children, now counsel for appellee foster parents] and told her that my sisters and I wanted to stay together and to stay with Mr. and Mrs. Lhotan.
>
> 12. She asked me if I wanted her to represent us in court and explained to me about the lawsuit. I told her I did want her to repsent us and be our lawyer.
>
> °°°
>
> 14. I understand what having a lawyer means and I want my lawyer to do anything that will help us stay with Mr. and Mrs. Lhotan." (R., affidavit of Cheryl Wallace, annexed to Order to Show Cause, docket entry #16)

After being joined as a party plaintiff in this action, Cheryl Wallace submitted another affidavit stating that she wanted to press in court her "right

to a review and to present what [my sisters and I] thought before we could be taken from our foster parents' home." (R., entry #51). She gave testimony to the same effect at the hearing in this case. (A. 304a-305a)

The children's pleadings and their testimoney thus squarely refute the appellant-intervenors' contention that there is no case or controversy because "[t]he District Court . . . granted the children relief which they had neither requested nor wanted." Appellant Rodriguez' brief, at 37.

Although the children themselves sought the pre-removal hearing, it is true that their court-appointed counsel "neither requested nor wanted" it. This case is thus rendered anamolous by the fact that the children's court-appointed attorney has continuously opposed the relief granted to them. Notwithstanding that opposition, the District Court clearly had the authority to render the judgment it did. The children's complaint which prayed for the pre-removal hearing was neither amended nor withdrawn. Nor did any

of the plaintiffs or their representatives seek to do so.*

Even if the pleadings had not expressly requested the relief granted, the court had the power to award it so long as the plaintiff children were entitled to it. Ruel 54(c), Fed.R. Civ. P. Once the case proceeds to the merits, "it is the duty of the court to grant the relief in the pleadings." 6 Moore's Federal Practice, §54.62 at 1271 (1976). It is the essence of equity jurisdiction that

> "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust

* It is doubtful that the children have standing to appeal from the judgment of the District Court. In order to appeal a party must be aggrieved by the judgment. Credits Commutation Co. v. United States, 177 U.S. 311 (1900). Successful parties have no standing to appeal. Public Service Commission v. Brashear Freight Lines, 306 U.S. 204 (1939). A party who receives all of the relief which he sought cannot appeal from the judgment which secured relief. New York Telephone Co. v. Maltbie, 291 U.S. 645 (1934)

> their remedies so as to grant the necessary relief. . . [F]ederal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946)

Because the children's court-appointed counsel, dissatisfied with the judgment has chosen to appeal it,* two of the appellants erroneously conclude that there is no longer a "case or controversy" within the meaning of Article III, Section 2 of the Constitution. See appellant Rodriguez' brief, p. 37; New York City appellant's brief, p. 12.

It is clear, however, that an appointed counsel or guardian ad litem cannot unilaterally dissipate an actual controversy that exists between one party and the party for whom counsel has been assigned, merely because he or she personally disapproves of the client's claim. There is inherent "power in the courts to regulate or disregard admissions made" by guardians ad litem or counsel appointed for infants pursuant to Rule 17(c) of the Federal Rules of Civil Procedure. 3A Moore's Federal Practice §17.27. Although a guardian for

* Even though the court-appointed counsel answered the complaint, and sought to have the complaint dismissed on behalf of the foster children, (R., Answer dated November 8, 1974, filed by Helen L. Buttenwieser) the District Court did not dismiss them as party plaintiffs.

children has a "duty. . . to bring the rights of the infant [as the guardian perceives them] to the notice of the court," the guardian obviously does not have the power to impose his or her views upon the court; the court possesses the "superior power" to disregard or overrule the guardian's position. Woerner, American Law of Guardianship 64 (1897) quoted in 3A Moore's Federal Practice §17.26 n. 19; see also 3A Moore's §17.27, p.954.

Because an appointed guardian, or any counsel for that matter, may be in personal sympathy with his adversary's position that "does not relieve [the] Court of the performance of the judicial function." Young v. United States, 315 U.S. 257,258 (1942).* Although the appointed counsel in this case was in evident sympathy with the defendants, she could not and did not deprive the District Court of its clear jurisdiction to entertain the lawsuit and grant the relief it did.

* Comparably, the Solicitor General's confession of error in an appeal before this Court is not dispositive without the Court's "independent consideration of the record." Chaifetz v. United States, 366 U.S. 209 (1961). See also Bruton v. United States, 391 U.S. 123 (1968), rejecting a Solicitor General's confession of error.

The role of an attorney is especially limited in class actions, where the court has a duty to assure that its judgment does justice for the entire class. For example, unlike other types of litigation, a class action may not be settled without explicit court authorization. Rule 23(e), Fed. R. Civ. P. Had the children's court-appointed counsel in this case wished to settle the children's claims by foregoing the preremoval hearing, she would have had to seek the District Court's approval which, in light of its ulitmate judgment,would surely have been withheld.*

Rather than eliminating the case or controversy, as appellants contend, the appointment of special counsel for the children in this case actually assured "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). At the time of her appointment as the children's counsel, Ms. Buttenwieser's opposition to pre-removal hearings on the basis that they were not in the children's interests, and her regular representation of the very agencies whose discretion is at

* As members of a class certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure all the children in the class are bound by the judgment of the District Court and cannot opt out of the class. Rule 23(c)(3); Fed. R. Civ. P; Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961).

issue in this lawsuit, were a matter of record.* With her appointment the District Court was merely ensuring the vigorous presentation of differing views. In an opinion declining to appoint alternative or additional counsel to represent on appeal the rights of foster children as established by the three-judge court, Judge Robert L. Carter specifically stated,

> "Ms. Buttenwieser has consistently represented the position she sincerely believes to voice the best interests of the foster children she was appointed to speak for. . . . Ms. Buttenwieser has made her views clear from the outset. . . I believe her position is unsound. . ." (R., memorandum endorsement June 29, 1976, p. 2, docket entry #107)

The District Court was confident that the foster parents would actively

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* See, e.g., In re Jewish Child Care Association [Sanders], 5 N.Y.2d 222, 235, 183 N.Y.S.2d 65, 75 (Froessel, J., dissenting). Moreover, it is undisputed that Ms. Buttenwieser has never met with the plaintiff children who represent the class, even when she moved to vacate the restraining orders which the court had issued with regard to them. (R., Notice of Motion filed by Ms. Buttenwieser, Dec. 27, 1974, docket entry # 64; affirmation of Ms. Buttenwieser, p.2, dated May 27, 1976, submitted in opposition to foster parents' post-decision motion for alternative or additional counsel, docket entry #107.)

seek the pre-removal hearing because it served their own as well as the children's interests. See Point III(B), infra. As is made clear by Judge Carter's memorandum opinion, supra, the court assigned Ms. Buttenwieser in order to insure that the contrary position would be argued by someone long concerned with children's interests. Appellee foster parents fairly infer that the task of arguing in favor of the pre-removal hearing was conferred upon them both by the District Court and by this Court, in declining to assign an independent children's counsel for this appeal who would seek an affirmance of the judgment below.*

The appointment of Ms. Buttenwieser was designed only to sharpen the issue and insure that all members of the class of foster children would be adequately represented. Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969).** Ms. Buttenwieser's

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* See memorandum opinion of Judge Carter, supra, appeal dismissed, ___ F.2d ___, (Docket No. 76-7333, Second Circuit Sept. 21, 1976); ___ U.S. ___ (order denying appellees' motion for appointment of separate counsel, Nov. 15, 1976)

** In Dierks, a class action was allowed, notwithstanding the fact that some members of the plaintiff class opposed the relief, because the court found that their interests could be adequately represented by the defendants. Similarly in this case, Ms. Buttenwieser's representation of the class of foster children is adequate only by virtue of the presence of the foster parents as appellees,, inasmuch as the latter will assert the claims of those children who desire the relief granted by the district court. See Point III, B., infra.

appointment is simply a reflection of the sound custom in cases of far-reaching consequences to "invite specially qualified counsel to appear and present oral argument" in order to assure a full exploration of the issues. Granville-Smith v. Granville-Smith, 349 U.S. 1, 4 (1955).

It is thus apparent that, despite the position of the children's counsel, the case or controversy between the children and the defendants is being "pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash or adversary argument." United States v. Fruehauf, 365 U.S. 146, 157 (1961). This Court need only be satisfied that "the applicable constitutional questions have been and continue to be presented vigorously and 'cogently,' Holden v. Hardy, 169 U.S. 366, 397 (1898)." Craig v. Boren, ___ U.S. ___, 45 U.S.L.W. 4057, 4058 (December 20, 1976). Inasmuch as the relief sought by the foster parents - a hearing prior to removal of the child - is identical to that which the District Court has granted to the foster children, this Court is assured that the judgment of the District Court will be vigorously defended. The controversy between the children and the defendants is thus squarely posed for adjudication by this Court.

B. Third Party Standing

Alternatively, as a matter of third party standing, the foster parents may seek an affirmance of the District Court judgment on behalf of the children. Had there been no plaintiff class of foster children in the District Court, the foster

parents would have had standing to assert not only their own claim to a pre-removal hearing, but the constitutional rights of their charges as well.

Although the District Court's appointment of counsel for the children normally would have relieved the foster parents of the need to raise the children's claims, their present standing to do so is essential because of the unusual feature of this case: the children's counsel has expressly and continually refused to seek for the children the pre-removal hearing to which the District Court has held they are entitled as a matter of due process. Except through the foster parents, the children have no other voice with which to assert their rights in this Court See Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974) (hereafter referred to as Harvard Note); Cf. Gilmore v. Utah, ___ U.S. ___, 45 U.S.L.W. 4053 (Dec. 13, 1976).

1. Direct Personal Injury to Foster Parents

Before a litigant may raise the claims of third parties he must, of course, allege a substantial, direct and palpable injury to himself. Here the defendants' actions have plainly inflicted "injury in fact" upon the foster parents. Baker v. Carr, supra, 369 U.S. at 204.

The defendants' failure to provide a hearing before taking a child from foster parents who have sheltered and nurtured the child for extended periods is, the foster parents claim, a violation of their rights to family liberty and privacy

guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution. (A. 28a-34a, Second Amended Complaint, ¶¶59, 60, 61, 63, 66, 68, 69, 71, 72, 73, 77) Also at stake are their professional and pecuniary interests as foster parents licensed by the state. Insofar as the removal of a child may be due to the foster parents' shortcomings, the failure to advise them of those facts and to provide an opportunity for refutation poses the threat of immediate financial loss.*

Although the District Court declined to reach all the foster parents' claims, their standing to assert them "in no way depends upon the merits of their contention that the particular conduct is illegal [as to them]." Flast v. Cohen, 392 U.S. 83, 99

* Foster parents who care for children placed with them by authorized child-care agencies in New York receive monthly payments for the care of those children. Public child care programs, such as the Nassau County Children's Bureau, pay foster parents directly out of public funds. Voluntary child-care agencies, such as Catholic Guardian Society, receive reimbursement from the local public child welfare agency, in this case Special Services for Children, which includes the payment made to the foster parents plus an additional amount for agency overhead. See Perez v. Sugarman, supra; R., hearing transcript, pp. 87-88, docket entry #84.

(1968); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Where jus tertii standing is otherwise appropriate, this Court has not hesitated to adjudicate third party interests even without reaching the litigant's personal injury. Pierce v. Society of Sisters, 268 U.S. 510 (1925).* Moreover, since the District Court proceeded to the merits of the third party claim, at this stage the "denial of jus tertii standing can serve no functional purpose." Craig v. Boren, ___ U.S. ___, 45 U.S.L.W. 4057, 4058 (U.S. Dec. 20, 1976).

2. Relationship Between Foster Parent and Child; Mutuality of Relief

In order to assert the children's claims, the foster parents must also demonstrate that their interests and the children's are so meshed that the defendants' actions have injured them both. Jus tertii standing requires that the litigant's interests and that of the third party must

* In holding that the Pierce statute violated the due process rights of non-litigating parents this Court did not address the claims of the school officials who were parties to the action. Even where the merits of the litigant's claim have been expressly rejected, that alone has not defeated their jus tertii standing. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (landlords permitted to raise rights of tenants although zoning ordinance upheld); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (importer permitted to assert rights of individuals to possess obscene material although import prohibitions were sustained)

be sufficiently intertwined that judicial relief accorded one is an effective vindication of the claims of the other. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, supra; Harvard Note, supra.*

In Pierce, for example, private school officials were permitted to raise due process rights of parents in a challenge to a statute which penalized the latter for failing to send their children to public school. The interests of the school officials (financial survival of their schools) and of the parents (the freedom to raise and educate their children) were meshed in such a way that invalidation of the statute served to redress the grievances of both. See also, Procunier v. Martinez, 416 U.S. 396, 409 (1974); Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala.) aff'd sub nom. Wallace v. U.S., 389 U.S. 215 (1967); Marable v. Alabama Mental Health Board, 297 F. Supp. 291 (M.D. Ala. 1969).

In the present case, the essence of of the foster parents' grievance is that children are precipitously taken from them

* Jus tertii cases in which the litigant, the third party, and the injury to each of them are clearly identifiable have been distinguished from classic First Amendment overbreadth cases in which there is no constitutional deprivation to the litigant and the injured third party is hypothetical only. Harvard Note, supra, see Coates v. Cincinnati, 402 U.S. 611, 616 (1971).

without an opportunity for either the foster parents or the children to express their views and present relevant information, and with no assurance that all facts are before the decision-maker. The relief the foster parents sought for themselves -- a hearing prior to removal of the child -- is precisely that which the District Court granted to the children.*

This inextricable connection between the children's rights and redress of the foster parents' grievance -- a nexus sufficient to give the latter standing to assert the rights of the former -- was clearly perceived by the District Court. In according the children a hearing, the court echoed the foster parents' concern about "the capricious movement of children" and agreed that a pre-removal hearing enabled the decision-maker "to make an informed decision after a hearing at which all relevant information has been presented." (A.J.S. 11a, 12a)

* So satisfactorily does the children's relief redress the foster parents grievances that it is unlikely that they would have appealed had the District Court reached their own claim and ruled against them. The District Court specifically did not reach all of appellee foster parents' claims. See A.J.S. 8a-9a, 20a, fn. 12.

Although the District Court expressly confined its ruling to the children's rights, it recognized that the absence of a pre-removal hearing severely impaired the foster parents as well:

> "Plainly, the present pre-removal conference is not designed adequately to fulfill [the] data-gathering function. . . [T]he foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate. Such a scheme fails to satisfy even the most minimal requirement of procedural due process." (emphasis added) A.J.S. 12a

3. Inability of Foster Children to Assert Their Own Rights

This Court has looked most favorably upon jus tertii standing when circumstances render it impracticable if not impossible for the third party to assert his own rights. Cf. Gilmore v. Utah, supra. Here, in every sense, the foster parents are "the only effective adversary of the unworthy [state action] in its last stand." Barrows v. Jackson, 346 U.S. 249, 259 (1953).

The singular inability of the children to assert their own claims to a pre-removal hearing stems from their counsel's unalterable opposition to it. See Point

III(A), supra. That opposition deprives the children who want it of any means, except through the foster parents, of seeking the hearing which the District Court held was theirs as a matter of constitutional right.

CONCLUSION

For all the foregoing reasons, appellee foster parents respectfully request this Court to affirm the judgment of the three judge district court.

Respectfully submitted

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